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No. 82-898

IN THE

Supreme Court of the United States

October Term, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION,

Appellants,

vs.

LEON W. KNIGHT, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

BRIEF OF APPELLANT MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES

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[illegible] — [illegible] — [illegible]

QUESTIONS PRESENTED

1. Whether public community college faculty members have a right under the First and Fourteenth Amendments to the United States Constitution to participate in discussions concerning non-negotiable policy matters between the faculty members' public employer and their exclusive representative which are held pursuant to a state public employment labor relations law and corresponding negotiated contract provisions.

2. Whether a cumulative voting system is required by the First and Fourteenth Amendments to the United States Constitution to ensure that public community college faculty members who do not belong to the faculty's exclusive representative have a fair opportunity to participate in discussions concerning non-negotiable policy matters between the public employer and the faculty's elected representative.

3. Whether the district court abused its discretion in awarding plaintiffs 20 percent of their costs in this case.

PARTIES TO THE PROCEEDING

The caption of this case which contains the names of all parties to the proceeding before the three-judge United States District Court whose judgment on the above-stated question Appellants seek to have reviewed is as follows:

Leon W. Knight, Morgan Kjer, Donald A. Dahlin, James D. Wallace, Terrence D. Florin, William B. Bauman, Harold J. Gardner, Thomas J. Patin, Eugene D. Mielke, Dr. Richard A. Thompson, David R. Grout, Joan M. Farkas, Gary Lee Nelson, Ronald Lievense, Lucille Johnson, Virginia E. Lanegran, Max A. Malmquist, Ralph G. Powell, Richard D. Isenhart, Cresston Gackel, Plaintiffs.

v.

Minnesota Community College Faculty Association; Minnesota Education Association; Independent Minnesota Political Action Committee for Education; National Education Association; James A. Norman, individually and in his former official capacity as President, Minnesota Community College Faculty Association; James K. Durham, individually and in his official capacity as Vice President, Minnesota Community College Faculty Association; Robert Bell, individually and in his official capacity as Secretary, Minnesota Community College Faculty Association; Calvin Minke, individually and in his official capacity as Treasurer, Minnesota Community College Faculty Association; Ralph S. Chesebrough, individually and in his official capacity as Executive Secretary, Minnesota Community College Faculty Association; Donald Holman, individually and in his official capacity as Minnesota Education Association Representative, Minnesota Community College Faculty Association; William M.

Mondale, individually and in his former official capacity as President, Minnesota Education Association; James Rosasco, individually and in his former official capacity as President, 1973-1974, Minnesota Education Association; Alfred F. Provo, individually and in his former official capacity as Treasurer, Minnesota Education Association; Albert L. Gallop, individually and in his official capacity as Executive Director, Minnesota Education Association; Fulton B. Klinkerfues, individually and in his former official capacity as President, Independent Minnesota Political Action Committee for Education; Janet R. Morgan, individually and in her former official capacity as Vice President, Independent Minnesota Political Action Committee for Education; John W. Schutt, individually and in his official capacity as Treasurer, Independent Minnesota Political Action Committee for Education; James A. Harris, individually and in his former official capacity as President, National Education Association; Helen D. Wise, individually and in her former official capacity as President, 1973-74, National Education Association; Catherine O'C. Barrett, individually and in her former official capacity as President, 1972-1973, National Education Association; Terry E. Herndon, individually and in his official capacity as Executive Secretary, National Education Association; Sam E. Lambert, individually and in his former official capacity as Executive Secretary, 1972-1973, National Education Association; Raymond Crippen, Rosemary McVay, John Sontorovich, Hugh V. Plunkett III, Arleene Nychklemoe, Douglas Alan Bruce, Ronald H. Denison, Edward G. Ziegler, Val Bjornson, Charles Swanson, individually; Philip C. Helland, individually and in his

official capacity as Chancellor of the Minnesota Community Colleges; John F. Helling, individually and in his official capacity as President, North Hennepin Community College; Dale A. Lorenz, individually and in his official capacity as President, Normandale Community College; Neil Christenson, in his official capacity as President, Anoka-Ramsey Community College; Wayne S. Burggraaff, in his official capacity as Minnesota Commissioner of Finance; James Lord, in his official capacity as Minnesota State Treasurer; Peter Obermeyer, in his official capacity as Director of the Minnesota State Bureau of Mediation Services; Willard H. McGuire, in his official capacity as President, National Education Association; Roger Johnson, in his official capacity as Chairman, Independent Minnesota Political Action Committee for Education; Donald C. Hill, in his official capacity as President, Minnesota Education Association, Toyse Kyle, Elma Ponto, Joseph Norquist, Nadine Chase, Paul Brinkman, in their official capacities as members of the Minnesota State Board for Community Colleges, Defendants.

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OPINION BELOW

The opinion of the three-judge United States District Court has not been officially reported. It is set forth in the Appendix to Jurisdictional Statement (App. to Jur. St.) at p. A-7. The District Court's Findings of Fact are set forth in the Appendix to Jurisdictional Statement at p. A-32. A subsequent order of the district court which is also the subject of this appeal is set forth in the Joint Appendix (J.A.) at p. A-190.

JURISDICTION

The Minnesota State Board for Community Colleges appealed from the judgment entered on March 31, 1982, of a three-judge United States District Court convened pursuant to 28 U.S.C. §§ 2281, 2284. Post-trial motions for relief from judgment, for a new trial, to alter or amend the judgment, and for a hearing on an award of attorneys' fees were denied by the court on August 13, 1982. A notice of appeal to this Court was filed in the United States District Court, District of Minnesota, Fourth Division, on October 1, 1982. The Court's order noting probable jurisdiction in this case and consolidating this appeal, case No. 82-898, with another appeal from the same action, No. 82-977, was entered on March 28, 1983. On June 6, 1983, this Court granted the motion of appellants in case No. 82-977 to expand the record and enlarge the questions for review.

The Supreme Court is vested with jurisdiction over this appeal by 28 U.S.C. § 1253.

STATUTES INVOLVED

The district court declared unconstitutional as applied Minn. Stat. § 179.66, subd. 7. This statute is reproduced in the Appendix to Jurisdictional Statement at p. A-91.

Other relevant sections of Minnesota's Public Employment Labor Relations Act are reproduced in the Appendix to Jurisdictional Statement at p. A-87 *et seq.*

The appeal of the labor organizations, case No. 82-977, which was consolidated with this appeal and which is discussed herein involved Rule 54(d), Fed. R. Civ. P., which is reproduced in the Jurisdictional Statement of Appellant Labor Organizations at p. 3.

STATEMENT OF THE CASE

This is an action challenging on First and Fourteenth Amendment grounds portions of Minnesota's Public Employment Labor Relations Act (PELRA) as it applies to faculty members in Minnesota's community college system. This action was initiated on December 17, 1974 by a group of 20 community college faculty members. After a lengthy trial before a special master, a three-judge federal district court panel held that the "meet and confer" provision of PELRA as applied in Minnesota's community colleges violated the plaintiffs' First and Fourteenth Amendment rights insofar as they were effectively precluded from participating in the meet and confer process.

A. The Parties.

The Minnesota community colleges are public post-secondary two-year educational institutions under the jurisdiction and control of the appellant, Minnesota State Board for Community Colleges (Board). Minn. Stat. § 136.60, subd. 1 (1982). At the time of the trial there were 18 community colleges under the Board's jurisdiction. (R. 396-397). Each college is under a president and the presidents report to the chancellor, the chief executive officer of the system. (R. 395-398). Faculty at the 18 community college campuses comprise a single bargaining unit which since 1971 has been represented by the appellant Minnesota Community College Faculty Association (MCCFA). The MCCFA is an employee organization formally affiliated with the appellants, Minnesota Education Association (MEA) and the National Education Association (NEA). (Findings of Fact, App. to Jur. St. A-37).

The plaintiffs below are 20 community college faculty members who are part of the bargaining unit of community college faculty members represented by the MCCFA but who are not members of it, the MEA, or the NEA. (Findings of Fact, App. to Jur. St. A-34). The plaintiffs oppose representation by the MCCFA in meet and confer and seek to be directly involved in that process. (Findings of Fact, App. to Jur. St. A-34-A-35).

B. Faculty Governance Prior To PELRA.

The community college system was formed pursuant to legislation passed in 1963 which combined a number of public two-year colleges that were being run by local school districts. Minn. Laws 1963, ch. 837, section 29. Prior to the adoption of PELRA in 1971, there were a variety of internal faculty governance structures existing in the community colleges. The structures varied from campus to campus and ranged from very authoritarian college presidents who allowed only minimal faculty involvement in administrative decisionmaking to more democratically operated campuses with considerable faculty involvement through influential faculty senates. (J.A. A-45-A-46, A-67-A-68, A-106-A-108, A-112, A-114-A-128, A-157-A-158). The record does not contain details of which colleges had faculty senates and which did not or exactly how faculty were involved in governance at all the colleges. Evidence of specific faculty governance systems is limited to only three of the 18 community colleges. (J.A. A-109-A-110, A-114-A-115, A-157-A-158).

Some faculty governance structures operated through elected representatives while others were general faculty assemblies. (Findings of Fact, App. to Jur. St. A-49). Usually,

at the colleges where a faculty governance structure existed, each faculty member was eligible to participate either directly or indirectly through a representative selection process. (Findings of Fact, App. to Jur. St. A-48-A-49). With the adoption of the first contract between the Board and the MCCFA in 1973, the faculties' governance structures were abandoned. (Findings of Fact, App. to Jur. St. A-49).

Irrespective of the level of faculty involvement in governance, the Board and its college administrations always maintained final policy and rulemaking authority. (J.A. A-53, A-67). Whether through faculty governance or the meet and confer process, faculty input was purely advisory and nonbinding.

C. Public Employment Labor Relations Act Of 1971.

In 1971 the Minnesota Legislature adopted the Public Employment Labor Relations Act, Minn. Stat. §§ 179.61 *et seq.* (1982). Its principal purpose is to establish "orderly and constructive relationships between all public employers and their employees . . . ." Minn. Stat. § 179.61 (1982) (App. to Jur. St. A-87). To this end, PELRA creates a system whereby public employees are divided into appropriate bargaining units. Minn. Stat. § 179.71, subd. 3 (1982). The members of each unit may decide if they will be represented by a separate exclusive representative. Minn. Stat. § 179.67 (1982) (App. to Jur. St. A-91-A-95). An employee organization can be certified to exclusively represent a public employee bargaining unit by the director of the Bureau of Mediation Services (BMS), an independent state official, either by receiving a majority of the votes cast in a certification election involving employees in the unit or by voluntary recognition of the employer. *Id.* Certification by voluntary recognition requires a

joint request of the employer and the employee organization, a finding by the director of the BMS that no unfair labor practice was committed in submitting the request, and a determination that the organization represents over 50 percent of the employees in the bargaining unit. Minn. Stat. § 179.67, subd. 3 (1982) (App. to Jur. St. A-92).

The exclusive representative of a unit of professional employees has a duty to "meet and negotiate" the terms and conditions of employment on behalf of all employees in the bargaining unit. "Meet and negotiate" is a process whereby the public employer and the exclusive representative meet with the good faith intent of entering an agreement regarding the employees' terms and conditions of employment. Minn. Stat. § 179.63, subd. 16 (1982) (App. to Jur. St. A-89).

The exclusive representative may also "meet and confer" with the public employer on behalf of all employees in the unit. Minn. Stat. § 179.65, subd. 3 and Minn. Stat. § 179.73 (1982) (App. to Jur. St. A-90, A-95). Meet and confer means the formalized "exchange of views and concerns between [public] employers and their respective [professional] employees." Minn. Stat. § 179.63, subd. 15 (1982) (App. to Jur. St. A-89). The subjects of meet and confer are general policies and issues relating to the professional employees' employment which are outside the scope of the terms and conditions of employment. Minn. Stat. § 179.65, subd. 3 and § 179.66, subd. 3 (1982) (App. to Jur. St. A-90-A-91). In contrast to the negotiations process which is intended to lead to a formal collective bargaining agreement, no agreement is required concerning the matters discussed in the meet and confer process. Minn. Stat. § 179.66, subd. 1 (1982) (App. to Jur. St. A-90).

Teachers are professional employees under PELRA. Minn. Stat. § 179.63, subd. 10(c) (1982). For purposes of meet and

confer, professional employees' exclusive representatives are considered to be policy consultants whose "knowledge, expertise, and dedication . . . [are] helpful and necessary . . . and which may assist public employers in developing their policies." Minn. Stat. § 179.73, subd. 1 (1982) (App. to Jur. St. A-95).

If professional employees have selected an exclusive representative, the public employer may not meet and negotiate or meet and confer with any members of that bargaining unit except through their exclusive representative. Minn. Stat. § 179.66, subd. 7 (1982) (App. to Jur. St. A-91). By statute, this restriction does not "prevent communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, when such communication is part of the employee's work assignment." *Id.*[1]

Even if professional public employees opt not to elect an exclusive representative to negotiate terms and conditions of employment, they may still meet and confer with their employer through a representative they select. Minn. Stat. § 179.-73, subd. 2 (1982) (App. to Jur. St. A-95). This representative is not the "exclusive representative" and cannot negotiate a collective bargaining agreement governing terms and conditions of employment. The meet and confer representative's jurisdiction is limited to the meet and confer process.

The plaintiffs stipulated and the district court found that the system of exclusive representation created in PELRA furthers numerous state interests. (Stipulation, J.A. A-37-A-39; Findings of Fact, App. to Jur. St. A-52-A-53). Included among these interests are: promotion of orderly and construc-

[1] This provision was added to PELRA in 1982. Minn. Laws 1982, ch. 568, § 2.

tive relationships between public employers and employees; avoidance of confusion, conflicting demands and dissension resulting from more than one representative per bargaining unit; maintenance of labor peace; and the creation of a procedure for the systematic expression of faculty views on a broad range of campus policy questions. *Id.*

D. Meet And Confer.

The MCCFA has negotiated four two-year employment contracts with the Board since the adoption of PELRA in 1971. (Findings of Fact, App. to Jur. St. A-46). As exclusive representative, the MCCFA has engaged the Board in meet and confer on behalf of all faculty in the bargaining unit. Originally, meet and confer sessions were held six times a year but in the 1980-81 academic year that number was reduced to the statutory minimum of three per year. Minn. Stat. § 179.73 (1982) (J.A. A-47). In accordance with provisions in the negotiated contracts, meet and confer takes place through a committee of no more than eight members selected by the MCCFA. (Findings of Fact, App. to Jur. St. A-47, A-96-A-98; Pl. Ex. 1, R. 92, 92). Subjects discussed at meet and confer meetings have included budgetary planning, new course proposals, curriculum, degree requirements, student activity budgets, academic standards, and teacher evaluation. (Findings of Fact, App. to Jur. St. A-48).

In addition to the statutorily-mandated meet and confer meetings with the Board, the faculty contract (Pl. Ex. 1, R. 92, 92) requires that meet and confer sessions also take place with each college's administration on a campus-by-campus basis.[2] (J.A. A-51-A-52). At each college, three to six com-

[2] These meet and confer sessions at the local level are referred to as "exchange of views."

mittees of members selected by the MCCFA meet regularly with the college administration. (J.A. A-52; App. to Jur. St. A-97; Pl. Ex. 1, R. 92, 92).

The MCCFA's practice has been to select representatives for the faculty meet and confer committees from its own membership and it has not permitted nonmembers of the MCCFA to serve on any meet and confer committees. (Findings of Fact, App. to Jur. St. A-50). The Board has no role in selecting the faculty's meet and confer representatives. (Findings of Fact, App. to Jur. St. A-50).

The Board is not required by PELRA to abide by the views expressed by the formal meet and confer committee or by individual faculty members. Regardless of the views expressed by the faculty committees or individual faculty members, final policy decisions on matters which are the subject of the meet and confer dialogue are reserved exclusively to the Board. Minn. Stat. § 179.66, subd. 1 (1982) (App. to Jur. St. A-90; J.A. A-53).

The view expressed by the faculty meet and confer committee on any particular subject is considered by the Board and by the administration to be the official position of the faculty on that subject. (J.A. A-50, A-56, A-97; Findings of Fact, App. to Jur. St. A-49). At the same time, it is also recognized that individual faculty members may hold views and positions other than those expressed by the committee. (J.A. A-50; Findings of Fact, App. to Jur. St. A-49).

Outside the formal meet and confer process, there exist multiple opportunities for faculty members to communicate their views to the Board and to community college administrations. (Findings of Fact, App. to Jur. St. A-50). There is no policy or practice that prevents faculty members from presenting their positions either in writing or otherwise to the Board, the chancellor, or any college president. (J.A. A-62-A-63).

Prior to each on-campus Board meeting, the Board makes itself available to persons on that campus who wish to express their views individually or in groups. (J.A. A-57, A-61-A-62). The MCCFA has never attempted to deny or abridge such communications. (J.A. A-64; Findings of Fact, App. to Jur. St. A-50). In addition, many faculty members have met with the chancellor to discuss whatever subjects they wish to discuss. (J.A. A-62-A-63).

On the college level, faculty members are not precluded from advising their administrators of their problems or views. (J.A. A-61-A-64, A-83-A-84, A-99-A-101). College presidents use a variety of means to solicit opinions from their faculties and students. (J.A. A-63-A-64; Findings of Fact, App. to Jur. St. A-50). One president holds all-college "town meetings" to obtain the views of faculty and students. (J.A. A-61). Another president makes himself available to faculty and students in the college commons area. (J.A. A-61). At one college's meet and confer sessions, any faculty member can appear as a "special witness" with the consent of the parties to meet and confer. (J.A. A-97-A-98, A-103). At the same college, the president hosts luncheons with randomly-selected groups, including faculty, where any person can address the president. (J.A. A-99-A-100). In addition, there are general faculty meetings and faculty breakfasts. (J.A. A-83, A-99-A-103). Each community college administrator who testified indicated that he maintained an open-door policy to receive faculty communications whether or not such communication came from members of the MCCFA. (J.A. A-61-A-63, A-84, A-99-A-101). Even some of the plaintiffs have expressed their views on various subjects of their choice to college administrators outside the meet and confer process. (J.A. A-61-A-63, A-124-A-126, A-130-A-131, A-184-A-185; R. 289).

In spite of the variety of avenues of communication available to all faculty members outside the meet and confer system, some of the plaintiffs find these alternatives unsatisfactory. A recurring reason for this dissatisfaction is that the alternatives are viewed as less "effective" or less "meaningful" than either meet and confer meetings or the faculty governance systems existing before the enactment of PELRA. (J.A. A-154-A-155, A-161; R. 1032; Findings of Fact, App. to Jur. St. A-51).

For some period of time after the first collective bargaining agreement was negotiated, there was confusion and apprehension in the community colleges concerning the intended effect of the meet and and confer process on faculty communication with administrators. (J.A. A-64-A-65, A-84, A-102). The process was new and untried. Some administrators were reluctant to informally communicate with faculty members for fear of violating the new contract or of committing an unfair labor practice under PELRA. (J.A. A-143, A-152-A-153, A-185-A-187; R. 289-290, 1012-1014). But after this initial period of uncertainty, the channels of communication outside meet and confer have been readily available to faculty members. (J.A. A-64-A-65, A-102).

E. District Court Ruling.

The three-judge district court panel (Judge Earl Larson dissenting) decided that Minn. Stat. § 179.66, subd. 7 and provisions of the collective bargaining agreement (App. to Jur. St. A-96-A-98) conferring on the MCCFA sole authority for selection of faculty meet and confer committee members are violative of the First and Fourteenth Amendments to the United States Constitution insofar as they deny the plaintiffs a fair opportunity to participate in the meet and confer pro-

cess. (Memorandum Opinion and Order, App. to Jur. St. A-31). The court determined that the present meet and confer system infringes First Amendment speech and associational rights of faculty who do not desire to join the MCCFA. (Memorandum Opinion and Order, App. to Jur. St. A-24).

Despite the finding that the meet and confer sessions were not general public forums, the court ruled that the right to participate in a "state compelled" faculty governance system is a fundamental right of college faculty members and the State's access restrictions were not supported by compelling, legitimate interests. (Memorandum Opinion and Order, App. to Jur. St. A-22, A-28-A-32). However, the court limited its ruling to public institutions of higher education because of what it perceived to be the importance of shared decisionmaking therein. (Memorandum Opinion and Order, App. to Jur. St. A-23 n.19, A-29).

To comply with the court's order of March 31, 1982, the Board and the MCCFA established a new selection process which permitted open nominations and a democratic election whereby each faculty member voted once for each vacancy on both the state and the local meet and confer committees. (Order, J.A. A-190). In proceedings after this appeal was filed, the plaintiffs also challenged this new selection process. In an order dated April 5, 1983, (Order, J.A. A-190), the district court concluded that the new procedure used to select the faculty's meet and confer representative was not consistent with its prior order. The court found that this procedure operated to totally exclude nonmembers of the MCCFA from membership on meet and confer committees. (Order, J.A. A-192). In order to counterbalance the numerical advantage of

MCCFA members, the district court ordered a cumulative voting process to

> ensure that nonunion faculty members will be able to elect at least one representative to each meet and confer committee if the committee size is retained at six, non-MCCFA faculty members constitute at least 17 percent of those present at the election, and they concentrate their votes behind a single candidate.

(Order, J.A. A-193). Under the court's order of April 5, 1983, non-MCCFA faculty members can concentrate all of their votes on one candidate. While this does not guarantee the plaintiffs a reqpresentative, the court ruled that the Constitution requires a voting procedure which affords a minority faction of the faculty a process which will ensure that it can potentially elect a representative despite its minority status. (Order, J.A. A-193).

SUMMARY OF ARGUMENT

The meet and confer process under the Minnesota Public Employment Labor Relations Act is a statutorily-established mutual exchange of views between a public employer and the professional employees' exclusive representative regarding non-negotiable educational and employment policy matters. Because it is primarily a private dialogue rather than a public forum for expression of faculty members' views, the meet and confer system is not required to be open to faculty members who do not wish to be represented therein by the exclusive representative.

The district court's decision that college faculty members have a First Amendment right to participate in the meet and confer process separate from the exclusive representative ignores this Court's position that the First Amendment does not require a public employer to negotiate with its employees or to listen or respond to employees' views. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979). Moreover, the district court's conclusion that college faculty members are to be accorded special First Amendment treatment on the basis of a purported tradition of faculty governance is supported neither by the case law nor the record.

Even if First Amendment interests of the faculty were implicated, limiting the meet and confer process to the faculty's exclusive representative is not violative of the First Amendment because it constitutes a reasonable access restriction to a nonpublic forum which is viewpoint neutral. *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 103 S. Ct. 948 (1983). Meet and confer decisions are not public by tradition or designation. Access restrictions to such nonpublic forums are constitutionally permissible if

viewpoint-neutral and reasonable. Permitting only the exclusive representative access to the meet and confer process is based upon the viewpoint-neutral criterion of the status of the representative as the only organization selected by the faculty to represent all members of the bargaining unit.

The restrictive access is reasonable for several reasons. First, as exclusive representative of all community college faculty members, the MCCFA holds a special status which sets it apart from other groups of faculty members. In providing professional consultation to the Board, it is performing its official business. Second, this restrictive access promotes labor peace by an orderly exchange of views between the public employer and the faculty. Finally, the reasonableness of limiting meet and confer to the exclusive representative is further established by the fact that plaintiffs have access to numerous forums and alternative communication processes for expression of their views. They are free to present their views either individually or as a group. Outside of meet and confer, neither the Board nor the exclusive representative has attempted to restrict faculty members' access to any forum.

Even if the meet and confer process constituted a public forum, the state has sufficiently compelling reasons to justify restricting plaintiffs' participation in the meet and confer process. As in the negotiations process, it is essential that meet and confer be efficient, meaningful, orderly, systematic, and free from confusion and disruption. This Court has recognized that these reasons justify exclusive representation in public sector collective bargaining. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Plaintiffs' purported First and Fourteenth Amendment speech, association and equal protection interests are outweighed by the State's interests.

Even if the district court correctly concluded that the plaintiffs must be granted a fair opportunity to participate in the meet and confer process, plaintiffs have been accorded this opportunity. Under PELRA's process for selection of an exclusive representative, all faculty, including plaintiffs, have a voice. The exclusive representative was selected in a process that was open to and included the plaintiffs.

The cumulative voting procedure ordered by the district court to ensure that non-MCCFA faculty can elect a representative is not supported by the Constitution. The plaintiffs were given an opportunity to vote with all other faculty members for their meet and confer committee candidates and to serve in that capacity. That no plaintiffs were elected does not constitute a basis for compelled cumulative voting. Such a voting procedure amounts to mandatory proportional representation. This Court has rejected proportional representation requirements in an analogous situation. *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

Finally, the district court abused its discretion in awarding plaintiffs 20 percent of their costs. The record reflects that less than six percent of the trial involved the meet and confer issue. While the determination of costs is not a mechanical matter, the court's departure from objective norms constitutes an abuse of discretion. Plaintiffs were wholly unsuccessful on their other claims which according to the district court were based on a "frivolous" theory and which "hindered rather than helped the court to resolve the issues raised in their complaint." The award of 20 percent of plaintiffs' costs is not proportionately related to the degree of plaintiffs' success herein and rewards their "wasteful attempt to obfuscate and circumvent" the settled law on the other issues they raised.

ARGUMENT

I. THE MEET AND CONFER STATUTES AND CONTRACT PROVISIONS ARE CONSISTENT WITH THE FIRST AMENDMENT.

A. The Meet And Confer Statutes And Contract Provisions Are Constitutional Because The Plaintiffs Do Not Have A First Amendment Right To Engage Their Public Employer In A Private Dialogue.

The fundamental nature of the meet and confer process established in PELRA and in the collective bargaining agreements between the Board and the MCCFA is that of a private dialogue between the public employer and professional consultant-employees. "'Meet and confer' means the exchange of views and concerns between employers and their respective [professional] employees." Minn. Stat. § 179.63, subd. 15 (1982) (App. to Jur. St. A-89). The opportunity to act as consultant to the public employer is accorded to Minnesota community college faculty by statute. Minn. Stat. § 179.73 (1982) (App. to Jur. St. A-95).

The district court erred in elevating the statutory right to meet and confer to a constitutionally-mandated right. There is no dispute that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). However, the district court expanded on this principle beyond its proper limits. Not every communicative activity that faculty members may wish to engage in is entitled to First Amendment protection. Specifically, the interaction provided for in the meet and confer process is not the type that has been or should be afforded protected status.

Indeed, this Court so held in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979) (per curiam). There, as here, the plaintiffs argued that a public employer was required by the First Amendment to be receptive to communications from them related to the employer-employee relationship. Specifically, a union and its members challenged a public employer's rule that required public employees to submit their grievances to the employer's representative directly rather than through their union. *Id.* at 464. The union claimed that its First Amendment rights were infringed because the employer would not recognize its communications concerning its members' grievances. This Court acknowledged that the First Amendment protects a public employee's right to "associate and speak freely and petition openly . . . ." *Id.* at 465. Nevertheless, the Court held, "the First Amendment does not impose any affirmative obligation on the government [employer] to listen, to respond or, . . . to recognize the association and bargain with it." *Id.* The Court concluded that "all that the [employer] has done in its challenged conduct is simply to ignore the union. That it is free to do." *Id.* at 466.

The conduct challenged here is simply the converse of that in *Smith* and is similarly valid. In *Smith*, the employer would recognize communication from individuals but not from the union; here, the employer will meet and confer with the exclusive representative but not with individuals. For constitutional purposes, this is a distinction without a difference. The character of the parties, the communication sought, and the First Amendment right asserted are similar. Just as the First Amendment did not require the employer "to listen, to respond or, . . . to recognize" the union in *Smith*, it does not compel

the Board to listen to, to respond to, or to recognize the plaintiffs in the meet and confer process here.[3] *Id.*

The meet and confer process is not a public forum for general expression of faculty viewpoints. Relying on this Court's decision in *City of Madison, Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), the district court properly concluded that the plaintiffs have no absolute free speech right of access thereto. (Memorandum Opinion and Order, App. to Jur. St. A-22 n. 18). Meet and confer does not involve the kinds of faculty expression and association that have been recognized as First Amendment freedoms. Accordingly, the district court also correctly distinguished the decisions of this Court which addressed teachers' First Amendment freedoms of expression and association. *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967) (statutes and regulations which disqualified from employment public school teachers and state employees who advocated or belonged to organizations that supported the violent overthrow of the government ruled unconstitutional); *Shelton v. Tucker*, 364 U.S. 479 (1960) (state law requiring teachers to file affidavits listing names of associations to which they belonged or contributed ruled unconstitutional); and *Sweezy v. State of New Hampshire*, 354 U.S. 234 (1957) (right of a state attorney general acting under the aegis of the state legislature to question teachers about their lectures and knowl-

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[3] The district court found that the plaintiffs' inability to participate in the meet and confer process violated their associational interests as well as their speech interests. As explained herein, participation in meet and confer is not protected by the First Amendment. Since there is no fundamental right to engage a public employer in a private dialogue, plaintiffs' associational interests are not infringed by limiting meet and confer to the exclusive representative.

edge of certain subjects restricted). (Memorandum Opinion and Order, App. to Jur. St. A-21).

The meet and confer provisions of section 179.66, subd. 7 and the faculty contract provisions recognizing the MCCFA's authority to select its faculty meet and confer representatives (App. to Jur. St. A-97) do not abridge expression that is constitutionally protected. The free expression of views is not restricted by the meet and confer process. Faculty members' academic freedom is secure. They may speak to and associate with whomever they wish. There is no evidence of any restrictions on plaintiffs' classroom activities or teaching methods. The only act they cannot do is formally meet and confer with their employer.

Nevertheless, the district court found that inasmuch as PELRA's meet and confer process is a compelled system for resolution of issues outside the scope of collective bargaining, participation therein is a fundamental First Amendment right of public college faculty members. (Memorandum Opinion and Order, App. to Jur. St. A-23). The district court's concern for protecting the faculty's role in educational policy decisionmaking at the college level is its primary justification for finding that participation in meet and confer is a fundamental right. (Memorandum Opinion and Order, App. to Jur. St. A-18-A-23). However, there is no authority to suggest that faculty participation in college governance is any more deserving of First Amendment protection than is the right to engage in collective bargaining. To the contrary, in *Gonzalez v. Irizarry*, 387 F. Supp. 942 (D. P. R. 1974), the court rejected college faculty members' claim of First Amendment protection of their participation in a statutory faculty senate system. The court found no basis for equating the right to vote for members of the Academic Senate with the right to political freedom and

association. *Id.* at 946. *Accord Johnson v. Board of Regents of the University of Wisconsin*, 377 F. Supp. 227 (W.D. Wisc. 1974) (college faculty are not constitutionally entitled to participate in deciding which faculty members will be terminated or laid off).

Moreover, the Minnesota district court's emphasis on the overriding importance of faculty participation in college governance was misplaced. It viewed this process as one of "shared decisionmaking" and relied upon four monographs as examples of literature in the field which support its existence and importance. (Memorandum Opinion and Order, App. to Jur. St. A-18). The court thus found "a longstanding tradition of a faculty participation in college governance" and determined that college faculty members should be involved in decisionmaking. (Memorandum Opinion and Order, App. to Jur. St. A-18).

However, the tradition of shared decisionmaking on which the court strongly relied is viewed by some authorities as more "an ideal that a widely adopted practice." K. Mortimer & T. McConnell, *Sharing Authority Effectively* 4 (1978). The popular concept of academic governance as expressed by the district court more accurately reflects what some feel "*ought* to be rather than what actually *is*." *Id.* at 5 (emphasis in original).

Furthermore, the court made no distinctions among faculty governance at the two-year community colleges, technical schools, four-year liberal arts colleges, and state universities with undergraduate, graduate, and professional schools. The district court erroneously assumed that shared decisionmaking was homogeneous in fact and existed at all levels of higher education and at all institutions. But faculty involvement in community college governance is not generally comparable

to that in other types of educational institutions.[4] The governance tradition in a two-year community or junior college system emerging from local school district control to statewide systems is different from that of four-year colleges and universities both emerging and mature. American Association for Higher Education—National Education Association, *Faculty Participation in Academic Governance*, 10-11, 31-32 (1967).

Moreover, the evidence in this case does not fit the district court's view of faculty governance. There was no distinct pattern of faculty governance in the community colleges. (J.A. A-45 - A-46, A-67 - A-68, A-112, A-114 - A-120, A-123 - A-124, A-157 - A-158). The district court's reliance on a tradition of shared decisionmaking in the community colleges is misplaced.

Finally, sound public policy does not justify expanding the scope of the First Amendment to include the kind of dialogue included in the meet and confer process.

Inherent in the definition of meet and confer is the mutual obligation of the public employer and the exclusive representative to engage in a dialogue. The parties are expected to listen and respond in a meaningful fashion to one another's views on educational and college policy matters. However, the subject matter of meet and confer is those matters reserved to management decisionmaking and the views of the faculty representatives need not be heeded by the employer. *Minneapolis*

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[4] For example, the limited decisionmaking authority of community college faculty in this case is in sharp contrast to the situation at institutions such as Yeshiva University which have absolute authority in academic matters. At Yeshiva the faculty decides what courses are offered, when they will be offered, sets admission standards, grading policies and matriculation requirements, and in essence makes management decisions. National Labor Relations Board v. Yeshiva University, 444 U.S. 672, 687 (1980).

Federation of Teachers v. Minneapolis Special School District, 258 N.W.2d 802 (Minn. 1977). The State of Minnesota has determined that it is in its best interest in formulating its policy decisions to avail itself of the expertise of its professional employees in the role of consultants. Minn. Stat. § 179.73 (1982) (App. to Jur. St. A-95). For this limited but important function, the State has decided to restrict its public employers to meeting and conferring with only the exclusive representative of professional employees or, if one has not been certified, with the employees' meet and confer representative. Minn. Stat. § 179.66, subd. 7 (1982) (App. to Jur. St. A-91).

To require that each faculty member has a constitutional right to meet and confer either directly or through a representative with the public employer would result in a burdensome intrusion into the policymaking function of higher education governing boards such as the Minnesota State Board for Community Colleges. It may be enlightened labor policy to consult with professional employees, but it would pose a serious threat to the efficient administration of the community colleges if the Board were constitutionally mandated to meet and confer with representatives of each faculty group.

Accordingly, the First Amendment does not obligate the Board to consult with or listen to any person or group including its faculty members. The district court's contrary ruling mandates that the faculty be involved in policy decisions as a matter of constitutional right. This decision is contrary to this Court's decision in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979), is contrary to the facts, and is an unwarranted intrusion into the administration of the community college system. For these reasons the decision below should be reversed.

B. Even If The Meet And Confer Process Implicated First Amendment Interests, That Process Created Merely A Nonpublic Forum Which Is Reasonably Limited In Light Of The Purposes It Serves.

Even if the meet and confer process did involve activity entitled to some protection under the First Amendment, this Court's recent decision, *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 103 S.Ct. 948 (1983), compels the conclusion that the district court's decision should be reversed. In *Perry*, this Court upheld restrictions imposed on access to a forum for communication in an educational institution because: a) the forum was not open to the public either by tradition or designation; and b) the restriction on access was reasonably based on the parties' status rather than viewpoint. These same conditions are present here and require a similar conclusion.

1. Meet And Confer Sessions Are Not Public Either By Tradition Or By Designation.

In *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 103 S. Ct. 948 (1983), this Court ruled that the First Amendment was not violated when a union that had been selected by public school teachers as their exclusive bargaining representative was granted access to the school district's interschool mail system while such access was denied to a rival union. A critical factor in the Court's analysis of the rival union's claim was the "character" of the use of the interschool mail system. *Id.* at. —, 103 S. Ct. at 954. If the public property was used, either by tradition or by designation, "as a place for expressive activity," a public forum was created. *Id.* at ——, 103 S. Ct. at 954-55. If, however, the pub-

lic property was reserved "for its intended purposes, communicative or otherwise," it was a nonpublic forum. *Id.* at ——, 103 S. Ct. at 955. The Court concluded in *Perry* that the school district's mail facilities were reserved for their intended purposes. *Id.* As a result, the school district could reasonably restrict access to them consistent with their intended purpose as long as the restrictions were not intended to suppress expression based upon the speaker's view. *Id.* at ——, 103 S. Ct. at 955, 957-58.

The district court in this action correctly concluded that the meet and confer process was not a public forum. (Memorandum Opinion and Order, App. to Jur. St. A-22). The same analysis used by this Court in *Perry* confirms that meet and confer sessions are not public by tradition or by designation. The meet and confer process is restricted to the public employer and either the exclusive representative, Minn. Stat. § 179.66, subd. 7 (1982) (App. to Jur. St. A-91), or the duly-selected meet and confer representative. Minn. Stat. § 179.73, subd. 2 (1982) (App. to Jur. St. A-95). Accordingly, these statutes have not created a public forum by designation. Furthermore, inasmuch as these statutory restrictions have applied consistently from the creation of the meet and confer process in 1971, Minn. Laws 1971, Ex. Sess., ch. 33, §§ 6 and 13, that process certainly is not a public forum by tradition.

The district court, however, determined that PELRA is the codification of the former faculty senate tradition together with the tradition of faculty participation in college governance. (Memorandum Opinion and Order, App. to Jur. St. A-18 - A-23). Although the court conceded that the meet and confer system was not a public forum, it believed the system was an important academic forum to which the plaintiffs have a First Amendment right of equal access. (Memorandum Opinion and Order, App. to Jur. St. A-22 - A-24).

The court erred in treating meet and confer as a forum to which plaintiffs have a right of equal access. First, the record does not support a finding of a faculty senate tradition in the Minnesota community colleges. Three community colleges had a formal faculty senate. (J.A. A-109 - A-110, A-114, A-157 - A-158). The only other evidence in the record of faculty involvement in college governance was a general description that it varied widely from considerable to very little involvement. (J.A. A-46). Therefore, the district court's reliance on "the faculty senate system which predated PELRA" and for which "all faculty members formerly had the right to vote for individual representatives" (App. to Jur. St. A-27, A-28) is simply unsupported by the record.

The second flaw in the district court's reasoning is that nothing in the record indicates that the legislature adopted the meet and confer provisions to codify a faculty senate system. Indeed, that meet and confer applies to all professional employees, not just college teachers, indicates that the meet and confer process did not merely codify the faculty governance system.

Moreover, the two systems, if there was a faculty senate system, are separate and distinct. Faculty senates operated locally while the statutory meet and confer process requires a dialogue at only the state level. Community college faculty senates were principally faculty groups involved in formulating faculty positions on college matters while meet and confer is a system for organized dialogue between the Board and college administration and the faculty through its exclusive representative. Also, at least two community college presidents participated in faculty senate deliberations and had voting rights (J.A. A-95, A-119). By contrast, in meet and confer there is no evidence of any participation by college administra-

tors in the formulation of faculty positions. In short, the district court's treatment of meet and confer as the codification of the faculty senate system is not supported by the evidence or by the language of PELRA.

Moreover, the meet and confer process does not contravene plaintiffs' First Amendment rights even if they have a lesser participatory role than existed under a prior faculty senate system. The "state is not required to indefinitely retain the open character" of forums. *Perry*, —— U.S. at ——, 103 S. Ct. at 955. Indeed, this Court in *Perry* rejected the contention that the plaintiff union's prior unrestricted access to the mail system mandated that accessibility to the forum be "judged by the constitutional standard applicable to public forums." *Id.* at ——, 103 S. Ct. at 956. Similarly, neither the state legislature nor the Board is obliged to make available to college faculty all attributes of previously existing forums.

In sum, using this Court's forum analysis, meet and confer is a forum reserved for its intended limited purpose of providing for an exchange of views between the public employer and its professional employees' exclusive representative. It has never been open to members of the public nor has it ever been open to each faculty member.

2. Restricting the Meet and Confer Process to the Exclusive Representative is Reasonable Because the Restriction is Viewpoint-Neutral and Because of the Exclusive Representative's Special Status.

If, as established in the preceding section, access to the government forum is limited to its intended purpose, such limitations are permissible if reasonable and not directed toward

suppressing a particular speaker's view. *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 103 S. Ct. 948, 957 (1983); *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 131 (1981) (limitations on a civic organization's use of mail boxes upheld). Limiting access to the exclusive representative MCCFA meets this test.

a. The Meet and Confer Process is Reasonable Because it is Viewpoint-Neutral.

Even if a public forum is limited to a particular purpose, the limitations cannot be used to suppress the expression of a person's views. *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 131 n.7 (1981). Restricting meet and confer to the exclusive representative was a general legislative determination made before anyone knew which organizations would be certified as exclusive representatives. Therefore, the meet and confer process under PELRA clearly was not intended to discriminate against speakers on the basis of their viewpoints.

Moreover, in *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 103 S. Ct. 948 (1983), this Court recognized that restrictions applicable to a rival union's access to an interschool mail system did not constitute viewpoint discrimination. *Id.* at ——, 103 S. Ct. at 957. The Court noted the absence of any "indication that the school board intended to discourage one viewpoint and advance another," and observed that "the access policy [w]as based on the *status* of the respective unions rather than their views." *Id.* (emphasis in original).

As in *Perry*, the meet and confer access policy is based on the status of the MCCFA as exclusive representative, not its viewpoints. This access is accorded any exclusive representative of professional public employees, regardless of its views. Minn. Stat. § 179.66, subd. 7 (1982) (App. to Jur. St. A-91). The status rather than the views of the organization is the determinative criterion. Such a criterion is viewpoint-neutral.

b. Restricting Access to the Meet and Confer Process to the Exclusive Representative is Reasonable Because the MCCFA Holds a Special Status.

Restricting meet and confer to the exclusive representative is reasonable for several reasons. First, the exclusive representative holds a special status under Minnesota's PELRA. Under PELRA, the exclusive representative is required to represent all employees in the bargaining unit. Minn. Stat. § 179.67, subds. 3 and 12 (1982) (App. to Jur. St. A-92, A-94). This responsibility includes not only negotiating and administering a labor contract for all employees in the bargaining unit but also meeting and conferring on their behalf. This Court has already recognized the serious responsibilities imposed on the exclusive representative in representing public employees in the bargaining unit. *Abood v. Detroit Board of Education*, 431 U.S. 209, 221 (1977).

Moreover, this Court has expressly recognized that these "special responsibilities" justify according the exclusive representative sole access to a nonpublic forum. *Perry*, —— U.S. at ——, 103 S. Ct. at 958-59. This Court in *Perry* noted that a public employer reasonably may permit only the exclusive representative access to a nonpublic forum if that access relates to "the forum's official business." *Id.* at ——, 103 S. Ct.

at 959 (footnote omitted). The "official business" of the forum was implicated in *Perry* because exclusive use of the school mail facilities by the exclusive representative permitted it "to perform its obligations as exclusive representative of *all* Perry Township teachers." *Id.* at ——, 103 S. Ct. at 958 (emphasis in original; footnote omitted). Exclusively meeting and conferring with the public employer is itself an official duty of the MCCFA. The Board's official function is to make policy and the MCCFA's function as exclusive representative is to be a professional policy consultant to the Board.

A second reason limiting access to the meet and confer process to the MCCFA is reasonable is that such restrictive access promotes labor peace by establishing "orderly and constructive relationships between all public employers and their employees" which is a goal of PELRA. Minn. Stat. § 179.-61 (1982) (App. to Jur. St. A-87). In meeting and conferring with the representative of all employees in the bargaining unit, the public employer is guaranteed a professional consultant in representing the collective wisdom of a majority of the community college faculty. Moreover, it would seriously impair the Board's function if it were constitutionally required to meet and confer with representatives of each subgroup of its faculty who espoused views of a policy issue different from that presented by the MCCFA. "There must be a limit to individual argument in such matters if government is to go on." *Bi-Metallic Investment Company v. State Board of Equalization*, 239 U.S. 441, 445 (1915). The plaintiffs are just one example of the various and changing interest groups which could demand access to the Board through the meet and confer process if the district court's decision is upheld. The present system prevents meet and confer from deteriorating into a forum for wrangling between rival employee groups. Un-

limited access to the meet and confer process could disrupt its function as an effective dialogue by creating a cacophony of professional views.[5]

"Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of . . . speaker identity." *Perry*, —— U.S. at ——, 103 S. Ct. at 957. The exclusive representative was selected by the members of the bargaining unit to be the exclusive agent to act in their behalf regarding matters relating not only to the terms and conditions of employment but also relating to educational and employment policies outside of the terms and conditions of employment. Minn. Stat. § 179.65 (1982) (App. to Jur. St. A-89). Accordingly, an orderly employment relationship and labor peace are furthered by limiting the meet and confer dialogue to the employer and exclusive representative.

Finally, the reasonableness of the limitations on access to the meet and confer process is supported by the substantial alternative channels that remain open for professional employee-employer communication. The reasonableness of access limitations is supported by "substantial alternative channels that remain open for . . . communication to take place." *Perry*, —— U.S. at ——, 103 S. Ct. at 959.

The plaintiffs have ample opportunities outside of meet and confer to communicate their views to the Board and the administration. The record is devoid of any instance where the Board had refused to hear any faculty member on any subject. The chancellor and the two college presidents who testified agreed that they are receptive to expressions of faculty mem-

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[5] The plaintiffs have never claimed to represent the interests of all non-MCCFA faculty members in the community college system. This was not a class action. The potential for myriad other factions to demand direct access to the meet and confer process is obvious.

bers' views regardless of their relationship to the MCCFA. (J.A. A-61 - A-63, A-83 - A-84, A-99 - A-101). College presidents and the Board have even attempted to encourage expressions of faculty views by making themselves conspicuously available on campus (J.A. A-57 - A-61), by sponsoring faculty breakfasts, luncheons, and all-college "town meetings" (J.A. A-61 - A-62, A-64, A-83 - A-84, A-99 - A-101), and by maintaining an open-door policy for faculty communications (J.A. A-61 - A-63, A-83 - A-84, A-99 - A-101). The plaintiffs who testified at the trial confirmed that these forums are available to them and that they have utilized some of them to communicate their views. (J.A. A-124 - A-126, A-130, A-185; R. 289, 433-4). The MCCFA has never attempted to interfere with faculty members' access to these forums. In this regard the district court found:

> The right of all faculty, both members and nonmembers of MCCFA, to communicate informally and individually with administrative officials has not been impaired by the MCCFA, MEA, NEA or the MSBCC.

(Findings of Fact, App. to Jur. St. A-52). The record and the district court's Findings of Fact conclusively dispel any concern regarding the plaintiffs' alternative modes of communication.[6]

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[6] There is no showing here that plaintiffs' ability to communicate with their employer is "seriously impinged by the restricted access" to the meet and confer system. Perry Education Association v. Perry Local Educators' Association, —— U.S. ——, 103 S. Ct. 948, 959 (1983).

C. The Meet And Confer Process Serves A Compelling Interest And Is Narrowly Drawn To Achieve That End.

Even if the meet and confer process constituted a public forum, the exclusive meet and confer process nevertheless is constitutional because it serves compelling state interests and the restrictions on access are narrowly tailored to serve those interests. The plaintiffs have stipulated to the State's interests and the district court has correspondingly adopted them. (Findings of Fact, App. to Jur. St. A-52 - A-53; J.A. A-37). Nevertheless, the district court refused to concede that the interests identified in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which support an agency shop are sufficiently compelling to support Minnesota's meet and confer system. (Memorandum Opinion and Order, App. to Jur. St. A-27).

This Court has determined that a state has sufficiently compelling interests to support a collective bargaining structure for public employees which utilizes an exclusive representative. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Many of the same state interests involved in *Abood* are involved in this case. The governmental interest in meeting and conferring with a single employee representative is similar to its interest in negotiating an employment contract with a single employee representative. As in *Abood*, the State is interested in eliminating confusion and creating a procedure for systematic expressions of faculty responses to policy matters. *Id.* at 220. The principle of exclusive representation serves the same purposes in both instances: the promotion of labor peace and stability through the construction of orderly relationships between employer and employee representative.

Moreover, the meet and confer process as presently structured improves the community college system. Education is one of the most important services performed by the state.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). The meet and confer process makes available an educational "policy consultant" to assist the Board in developing important educational and administrative policies. It provides the Board with resources and expertise in its deliberations on the essential matter of public education.

Nevertheless, the district court has required the Board to fashion a meet and confer representative selection process which undermines the ability of the meet and confer system to further these compelling state interests. Under the district court's scheme, it must be possible for the plaintiffs to elect their own representative to the faculty's meet and confer committee. (Order, J.A. A-193). Presumably, the district court would rule similarly on behalf of any other group of faculty members who claim to have views on any meet and confer issue other than the viewpoints represented by the meet and confer committee. Such a result underscores the State's interest in meeting and conferring with just the exclusive representative. Otherwise, size and membership of the faculty's meet and confer committee must be constantly monitored by the Board to ensure access by representatives of any special-interest faculty subgroup. To permit access to each subgroup would defeat the ability of the Board to obtain a benefit from the process. Meaningful input would be lost in the din of competing viewpoints.

The effect of the district court's decision potentially eviscerates the benefits reaped by the State in meeting and conferring with the faculty's exclusive representative. The State's incentive for continued involvement of faculty in educational policymaking may reasonably ebb if the responsibilities imposed upon it by the district court result in an ineffective array of faculty viewpoints limited only by the number of groups who demand to be involved in meet and confer consultations.

The meet and confer process is narrowly tailored to serve the State's compelling interest of fostering an orderly and meaningful exchange of views process with its professional employees.

II. IF THE PLAINTIFFS HAVE A FIRST AMENDMENT INTEREST IN THE SELECTION OF THEIR MEET AND CONFER REPRESENTATIVE, THAT INTEREST HAS NOT BEEN ABRIDGED AND THE CUMULATIVE VOTING REQUIREMENT IS IMPROPER BECAUSE THE PLAINTIFFS HAVE A VOICE IN THE SELECTION OF THEIR EXCLUSIVE REPRESENTATIVE.

The district court held that the First Amendment requires a "fair opportunity to participate in the selection of governance representatives." (Memorandum Opinion and Order, App. to Jur. St. A-23). It was undisputed that plaintiffs had an opportunity to participate in the selection of their exclusive representative. However, the court's conclusion that plaintiffs were not accorded a fair opportunity to participate in the selection of their meet and confer representative under either the original selection procedure or the procedure adopted to implement the court's order of March 31, 1982, is unfounded.[7]

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[7] The district court correctly decided that, because of the State's interest in maintaining an orderly process, the plaintiffs are not entitled to meet and confer individually with the Board. (Memorandum Opinion and Order, App. to Jur. St. A-22). The requirement of indirect representational participation was thus upheld. *Id.*

A. The Procedure For Selection Of An Exclusive Representative Under PELRA Provides Plaintiffs With A Fair Opportunity To Select Their Meet And Confer Representative.

PELRA provides all employees in a bargaining unit with a voice in the selection or removal of their exclusive representative. Minn. Stat. § 179.67 (1982) (App. to Jur. St. A-91). An employee organization is certified as the exclusive representative of the bargaining unit after receiving a majority of the votes cast in a certification election. Minn. Stat. § 179.67, subd. 7 (1982) (App. to Jur. St. A-93).[8] Ballots in certification elections include an option to vote for "no representation." Minn. Stat. § 179.67, subd. 9 (1982) (App. to Jur. St. A-94). Additionally, PELRA provides a procedure for the decertification of an exclusive representative and a new election where it is shown that the exclusive representative has lost the support of the majority of those in the unit. Minn. Stat. § 179.67, subds. 4 and 5 (1982) (App. to Jur. St. A-92 - A-93).

This procedure is available to the plaintiffs for the selection of their representative for collective bargaining and meeting and conferring. Every faculty member in the bargaining unit may vote in the election. Neither associational affiliations nor personal viewpoints can be or are used to disqualify any faculty member's involvement in the selection of their exclusive representative. PELRA provides a system that is open to all

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[8] Where the employee organization is certified as the exclusive representative upon the joint request of the organization and the employer, it is still required that the organization prove that it has obtained the support of more than 50 percent of the employees in the unit. Minn. Stat. § 179.67, subd. 3 (1982) (App. to Jur. St. A-92).

members of the bargaining unit without restriction. It is democratic, reasonable and fully consistent with the district court's mandate of a fair opportunity to participate.

The district court incorrectly rejected this reasoning because in the prior faculty senates all faculty members could vote for their faculty governance representatives and serve in that capacity and because the MCCFA can exclude from committee membership individuals whose views are inconsistent with those of the Association. (Memorandum Opinion and Order, App. to Jur. St. A-27 - A-28).

These reasons are inapposite. First, as discussed above, the meet and confer system is not the same as a faculty senate. *See* Section I.B.1., *supra*. The meet and confer process is an integral part of the formal relationship between the Board as a public employer and the faculty's duly-selected exclusive representative. Second, the plaintiffs do have the right to vote for their meet and confer representative when they elect their exclusive representative. Third, even if the plaintiffs had opportunities prior to PELRA that they do not have now, there is no constitutional violation. *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 103 S. Ct. 948, 956 (1983).

Additionally, the record does not contain evidence of any retaliation either actual or threatened against plaintiffs for the exercise of their First Amendment rights. The Board and its administrators treat all faculty without regard to their affiliational status. Similarly, there is no evidence in the record of any retaliation by the MCCFA or that the MCCFA used its access to the meet and confer process to impose "ideological conformity or otherwise impair the free expression of employees." *Abood v. Detroit Board of Education*, 431 U.S. 209, 219 (1977) (citing *Railway Employees' Department v. Han-*

son, 351 U.S. 225 (1956)). Indeed, the district court so held. (Findings of Fact, App. to Jur. St. A-52).

Thus, plaintiffs are entitled to participate in the selection of the meet and confer representative and have been afforded a fair opportunity to participate in the meet and confer process.

B. The Amended Procedure For Selection Of The Faculty's Meet And Confer Representative Fully Comports With The Court's Order Of March 31, 1982, And The Supplemental Order Requiring Cumulative Voting Lacks A First Amendment Foundation.

In compliance with the district court's order of March 31, 1982, the procedure for selection of the faculty's state and local meet and confer committees was revised. The new procedure allowed any willing faculty member to run for a position on one of the six-member committees and it also provided for a democratic election. (Order, J.A. A-191). All faculty in the bargaining unit were eligible to vote. To ensure that all six vacancies were filled, each voter was required to vote once for each vacancy on the committee. *Id.* In the first election under this procedure no non-MCCFA member was elected to a committee. *Id.*

The district court found that this new election procedure contravened its order of March 31, 1982:

> As long as MCCFA members continue to constitute a majority of the faculty persons voting and they vote for the union-endorsed slate, no non-MCCFA member can ever be elected.

Id. at A-191. To remedy this perceived deprivation of plaintiffs' First Amendment right to participate in the meet and

confer process, the court ordered that a cumulative voting system be implemented. *Id.* at A-192. Under this system,

> each elector will have a number of votes equal to the number of committee members to be chosen and will be permitted to concentrate his or her votes on one candidate, or to distribute them as he or she sees fit.

Id. at A-193. This system was ordered so that non-MCCFA faculty members will be able to elect at least one representative

> if the committee size is retained at six, non-MCCFA faculty members constitute 17 percent of those present at the election, and they concentrate their votes behind a single candidate.

Id. at A-193. The district court did not cite any authority for this decision.

If plaintiffs are entitled to vote for a separate meet and confer representative, they were accorded that right in the revised meet and confer selection procedure. The revised procedure involved a fully democratic election in which each faculty member could participate. The MCCFA's prior right to select committee members from its own ranks was eliminated. Each faculty member was eligible to vote for committee representatives and to serve in that capacity. This process fairly operated to set each faculty member on a par with every other individual faculty member. (Order, J.A. A-190). The revised election process was fully consistent with the district court's original requirement that each faculty member have a "fair opportunity to participate." (Memorandum and Order, App. to Jur. St. A-23). Nevertheless, the district court rejected the adequacy of this system and ordered a cumulative voting election system.

The court-ordered cumulative voting procedure erroneously results in the imposition of a constitutional mandate of proportional representation on meet and confer committees. There is no precedent for this decision. Moreover, this Court has rejected the argument that minority interests are constitutionally entitled to proportional representation in single- or multi-member legislative districts where the supporters of a losing candidate had no legislative seat assigned to them. *Whitcomb v. Chavis*, 403 U.S. 124, 157 (1971). In *Whitcomb*, a multi-member legislative districting arrangement was challenged as being discriminatory against certain racial minority factions primarily because it cancelled the voting power of a particular significant racial minority. *Id.* at 145. In its rejection of this challenge, this Court noted that the same claim could be propounded by any of several minority groups that are unable to elect a representative because of their minority status. *Id.* at 157.

> At the very least, affirmance of the District Court would spawn endless litigation concerning the multi-member district system now widely employed in this country.

Id. at 158 (footnote omitted).

This Court's rationale in *Whitcomb* compels rejection of the district court's cumulative voting requirement here. Cumulative voting was ordered below to ensure that a minority faculty group would be capable of electing a committee representative. The only factor preventing plaintiffs from electing a representative under the prior election system was that their candidates did not receive sufficient votes. (Order, J.A. A-191). This did not constitute a violation of the minority group's constitutional rights in *Whitcomb* and it does not violate the plaintiffs' constitutional rights in this case.

The cumulative voting requirement imposes a substantial and continuing burden on the Board to provide a meet and confer system that is accessible to the plaintiffs and presumably every other group of faculty members who are unrepresented on the meet and confer committee. While the district court apparently viewed the faculty as consisting of only two groups, there is nothing in the record to indicate that the community college faculty are clearly divisible along MCCFA and non-MCCFA lines. Faculty may coalesce into formal or informal interest groups which are unrelated to a union animus. A cumulative voting requirement opens the meet and confer system to every other interested faculty group despite its minority status. This result imposes on the Board an unreasonable burden which may not be met without sacrificing the intended benefits of the meet and confer process.

All community college faculty members had an opportunity to participate on an equal basis in the democratic election process which was enacted to comply with the district court's order of March 31, 1982. The subsequent cumulative voting requirement lacks a constitutional foundation and is inconsistent with the State's interest in an orderly and useful meet and confer arrangement.

III. THE DISTRICT COURT'S AWARD OF 20 PERCENT OF COSTS TO PLAINTIFFS CONSTITUTES AN ABUSE OF DISCRETION BECAUSE IT DOES NOT REFLECT A CAREFUL SCRUTINY OF THE COSTS NOR IS IT REASONABLE IN LIGHT OF THE PLAINTIFFS' LEVEL OF SUCCESS.

The MCCFA has correctly challenged the district court's award of costs to the plaintiffs as an abuse of discretion. (Jur. Stmt. of Labor Org. at 17). The court awarded plaintiffs 20 percent of their costs even though it was virtually uncontested

that the meet and confer issue upon which plaintiffs prevailed was addressed by none of the plaintiffs' expert witnesses and in only three percent of plaintiffs' exhibits, six percent of the trial transcripts, .004 percent of the plaintiffs' proposed stipulations. (Order, App. to Jur. St. A-2). The court's award arbitrarily allocated an amount which far exceeded the percentage of time and costs expended on the prevailing issue without sufficient justification. In fact, the court's sole reason for the disproportionate award was the "overlap between the First Amendment claim as to meet and confer practices and the other practices challenged by the plaintiffs." *Id.*

With regard to the issues which the court found to overlap with the question on which plaintiffs prevailed, the district court found that this protracted litigation (41 hearing days, 6,000 pages of transcript, and over 500 exhibits) largely resulted from the plaintiffs' refusal to acknowledge the impact of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). (Order, App. to Jur. St. A-3). The district court further found that the plaintiffs' elaborately-developed theory concerning issues other than meet and confer was "frivolous" and could have been presented "in a cogent manner as a legal question turning on largely undisputed facts." *Id.* at A-4. The district court went on to find that "indeed, the presentation of plaintiffs' case has hindered rather than helped the court resolve the issues raised in their complaint." *Id.* Similarly, the court found that "much of the present litigation has been a wasteful attempt to obfuscate and circumvent that clear holding [of *Abood*]" *Id.* at A-5, n. 2.

The authority to tax costs under Fed. R. Civ. P. 54(d) does not give district judges unrestrained discretion. *Farmer v. Arabian American Oil Company*, 379 U.S. 227 (1964). In *Farmer*, this Court noted that district judges should sparingly exercise their discretion in taxing costs not specifically al-

lowed by statute. A careful scrutiny of costs is needed, the Court stated, in order to reduce the high cost of litigation. This interpretation of Rule 54(d) is consistent with Rule 1 which requires that rules be interpreted so as to lead to a just, speedy and inexpensive determination of the action. Fed. R. Civ. P. 1. The district court's rationale of overlapping First Amendment issues to justify its award of costs is not consistent with the careful scrutiny standard established by this Court.

In a recent case concerning an award of attorney's fees under 42 U.S.C. § 1988, this Court held that the extent of an attorney's success is a crucial factor in determining the proper amount of fees. *Hensley v. Eckerhart*, —— U.S. ——, 52 U.S.L.W. 4551 (decided April 16, 1983). Specifically, *Hensley* concerned the provision in section 1988 which authorizes the trial court to exercise its discretion in granting attorney's fees as part of the costs authorized by Rule 54(d). In that case, the discretion granted to the lower court was tempered by this Court's ruling that consideration be given to the relationship between the extent of success of the prevailing party and the amount of the award. The lower court was required to consider what amount was reasonable in light of the level of success. *Accord Globe Life and Accident Insurance Company v. Still*, 402 F.2d 295 (5th Cir. 1968) (award of more than one-third of the costs to an appellant who had only obtained one-third of the judgment was an abuse of discretion).

In the present case, an award of 20 percent of costs to plaintiffs who prevailed on an issue that took a maximum of six percent of the trial time is a similarly disproportionate award. It far exceeds the percentage of time and costs expended on the prevailing issue. In essence, the award requires the Board and the MCCFA to subsidize the plaintiffs' unsuccessful and wasteful efforts to have the collective bargaining portion of

PELRA declared unconstitutional. The plaintiffs' protracted efforts on other than meet and confer issues were the principal subject of the trial and pre-trial proceedings. As the district court recognized, the plaintiffs unnecessarily prolonged these proceedings. The award of costs thereby serves to reward plaintiffs for their delaying tactics. As a result, the award of 20 percent of costs is not reasonable in light of the plaintiffs' level of success and should be set aside.

CONCLUSION

For the reasons stated, the decision of the district court finding that the meet and confer statutory and contract provisions are unconstitutional should be reversed and the award of costs should be set aside.

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Respectfully submitted,

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